No. 96-1538

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOHN D. TOLAND and CHRISTAL TOLAND,
as husband and wife and d/b/a the John Toland Company,

Petitioners,

—against—

IN RE: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIP LITIGATION, MDL DOCKET NO. 1005,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT PRUDENTIAL SECURITIES INCORPORATED IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court below correctly decided that where an absent class member had actual notice of a class action settlement prior to the expiration of the opt-out period but failed to take any steps to opt out, the district court's denial of the class member's request for relief under Rules 6(b) and 60(b) was not an abuse of discretion notwithstanding the class member's failure to receive mailed notice of the settlement.

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BRIEF OF RESPONDENT PRUDENTIAL SECURITIES INCORPORATED IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Prudential Securities Incorporated ("PSI")[1] respectfully submits that a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit should not issue because that decision does not conflict—nor is it even said by Petitioners to conflict—with any

[1] Pursuant to Supreme Court Rule 29.6, PSI advises the Court that neither it nor its ultimate parent, The Prudential Insurance Company of America, a mutual insurance company, nor any subsidiary or affiliate has issued shares to the public.

decision of any other circuit, because no question worthy of the exercise of this Court's certiorari jurisdiction is presented and because, in any event, the decision below is in all respects correct.

COUNTER-STATEMENT OF THE CASE

The factual statement in the Petition is legally inaccurate,[2] presents matters *dehors* the Record (*e.g.*, Pet. App. at 63-65) and contains numerous misstatements and omissions with respect to both the course of proceedings before the District Court and the opinion of the Court of Appeals. Such misstatements and omissions (which themselves reflect negatively on the "cert-worthiness" of this case) necessitate this counter-statement pursuant to Supreme Court Rule 15.2.

This Petition arises out of the historic and much publicized partial settlement in a multi-districted class action styled *In re Prudential Securities Incorporated Limited Partnerships Litigation*, MDL No. 1005 ("MDL 1005"). By the Final Judgment, Senior United States District Judge Milton Pollack of the Southern District of New York certified a Class against PSI and some of its co-defendants and approved a $110 million Settlement benefitting more than seventy-five thousand investors nationwide.[3] The Settlement was entered into by PSI

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[2] For example, the Petition erroneously contends that the decisions below violated Petitioners' rights under the Due Process clause of the *Fourteenth* Amendment. (Pet. at 2, 7) As the decisions below were issued by federal courts applying federal law, however, the constitutional provision involved is the Due Process clause of the *Fifth* Amendment.

[3] Capitalized terms have the same meaning ascribed to them in the Settlement Agreement found in the Appendix filed with the Court of Appeals at A65-A73. In addition, references herein to "Pet. at ___" are to the Petition for a Writ of Certiorari. References herein to "Pet. App. ____" are to the Appendices annexed thereto. References to "A ___" are to the Appendix filed by Appellants in the Court of Appeals for the Second Circuit on their appeal below. Where necessary, documents not in Appellants' Appendix are referred to by their record number on the district court docket sheet at A1 in the form "A1 - R.___."

to ensure peace and finality with respect to years of litigation arising out of its marketing and sale of limited partnership interests during the 1980's.

Petitioners John D. and Christal Toland ("the Tolands") are Class Members who, because they neglected to exclude themselves from the Class by opting out prior to the court-imposed deadline, are now bound by the Final Judgment, which includes a provision enjoining the continued prosecution of Settled Claims against PSI and other Released Parties. The Tolands seek the issuance by this Court of a writ of certiorari to review the parochial issue of whether the Court of Appeals properly affirmed Judge Pollack's exercise of his discretion to deny the Tolands' motion, pursuant to Rules 6(b) and 60(b) of the Federal Rules of Civil Procedure, for extraordinary relief from the Final Judgment and permission belatedly to opt out of the Class in order to continue an arbitration proceeding against PSI which is barred and enjoined by the Final Judgment.

A. Background

On May 19, 1994, Judge Pollack entered an order consolidating in the Southern District of New York several class actions transferred thereto by the JPML (of which he was then a member) which asserted claims arising out of PSI's marketing, sale and operation of over 700 Partnerships.[4] (A595) On June 8, 1994, the representative plaintiffs in the consolidated actions filed a Consolidated Complaint in which they asserted RICO and common law claims premised on allegations that the Partnerships were uniformly marketed and sold as part of a massive and continuing fraudulent scheme.

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[4] Prior to the consolidation of the various private actions filed against PSI, the Securities and Exchange Commission ("SEC") investigated PSI. PSI and the SEC entered into a consent decree in the United States District Court for the District of Columbia on October 21, 1993, under which PSI agreed to provide reparations to settle claims arising out of the same partnership failures (the "SEC Fund"). (A607)

(A598) PSI moved to dismiss the Consolidated Complaint on December 20, 1994. (A604)

B. The August 9, 1995 Settlement

After an "intensive and multifaceted investigation by plaintiffs' counsel" (A292) which included their review of millions of pages of documents produced by PSI, and after months of serious negotiations extensively and personally supervised by Judge Pollack, plaintiffs reached a Settlement with the PSI Settling Defendants (A610-11) which provided that PSI would pay $110 million into a Settlement Fund for the benefit of the Class. In return, Class Members would give a broad release and be enjoined from further litigation against PSI.

(i) The "Blow" Provision

A significant and fundamental part of the Settlement was a "blow" provision (A78-80) which recognized that while PSI was eager to make a global disposition to reach finality, PSI was unwilling to do so were it still to face the expense and burden of continuing to defend a multitude of cases around the country. Thus, the Settlement stipulated that if Class Members whose claims aggregated more than $10 million excluded themselves, PSI had the right to nullify (or "blow") the $110 million Settlement. If PSI exercised this right, the 100,000-plus Class Members would recover nothing by way of this Settlement. In effect, PSI was willing to pay a prospective $120 million: $110 million for the Settlement and potentially as much as $10 million more to cover opted-out claims.[5]

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[5] The Settlement Agreement provided that if PSI elected to "blow" the Settlement, the Court and Lead Class Counsel were to be notified no more than seven calendar days after the deadline set in the Preliminary Approval Order for the receipt of requests for exclusion—thus providing time for PSI to analyze the opt-outs. If on the day prior to the Fairness Hearing (after efforts by Lead Class Counsel to minimize the number of opt-outs), the aggregate of such claims did not exceed $10 million, then PSI's election to "blow" became null and void. (A80-81) Consequently, it was significant to PSI to know exactly what additional claims it might be facing so as not to render its bargained-for peace illusory.

(ii) Preliminary Approval of the Settlement

Describing the Settlement as an "outstanding achievement for the benefit of the Class" (A290), Judge Pollack entered the Preliminary Order on August 29, 1995 (A184) and filed an opinion in connection therewith (163 F.R.D. 200) which: preliminarily approved the proposed Settlement; preliminarily certified a proposed Class pursuant to Rule 23(b)(3); scheduled a Fairness Hearing; approved the form, content and manner of giving Notice; appointed Class representatives; and designated Lead Class Counsel. (A288)

The certified Class was defined as all persons or entities, acting in their own capacity or in a representative capacity, who "purchased Units in any of the Partnerships or other entities . . . between January 1, 1980 and June 8, 1994."[6] This Class definition excluded, *inter alia*, persons whose claims had previously been released, the Partnerships, defendants and the individual defendants' immediate families.

(iii) The Release and Injunction

The Settlement included a broad release (A77-78) by which Class Members relinquished all "Settled Claims" which were broadly defined.[7] (A71-72) To give teeth to the Release and ensure that the peace and finality for which PSI was paying $110 million would be preserved, the Settlement was conditioned on the incorporation in the Final Judgment of an injunction barring the continued prosecution of any Settled Claims. (A82)

(iv) Notice

The proposed Class Notice (A390) gave Class Members a fair understanding of the action, the parties and the nature of the Settlement. Specifically, the Class Notice contained the

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6 Petitioners are members of the Class.

7 Petitioners' claim is a Settled Claim.

following provisions under the heading "RIGHTS AND OPTIONS OF CLASS MEMBERS":

> "If you are a Class Member, you have a choice as to whether or not to remain a member of the Class . . . (a) IF YOU DO NOTHING YOU AUTOMATICALLY REMAIN A MEMBER OF THE CLASS . . . . YOU WILL NOT BE ABLE TO COMMENCE OR CONTINUE ANY OTHER LITIGATION, ARBITRATION OR OTHER CLAIM AGAINST ANY PSI SETTLING DEFENDANT IN ANY OTHER FORUM WITH RESPECT TO THE SETTLED CLAIMS . . . . (b) IF YOU WANT TO EXCLUDE YOURSELF FROM THE CLASS AND NOT BE INCLUDED AS A CLASS MEMBER, THE COURT WILL EXCLUDE YOU . . . ONLY IF YOU SUBMIT A WRITTEN REQUEST FOR EXCLUSION. TO BE EFFECTIVE THE WRITTEN REQUEST FOR EXCLUSION MUST BE SIGNED . . . AND MUST BE MAILED . . . SO AS TO BE RECEIVED NO LATER THAN OCTOBER 30, 1995 . . .
>
> * * * * *
>
> *If you . . . do not request exclusion in the manner and within the time described above*, you will automatically be included as a Class Member, and . . . *all orders or judgments issued by the Court in this litigation and any release given in connection with the Partial Settlement will be binding upon you.*" (A393) (emphasis supplied and omitted)

The Class Notice also specifically informed Class Members:

> "*If you have pending your own claim or action* against any person or entity in connection with an investment in any of the Partnerships (as defined [therein]), *you should consult with the attorney representing you*, as this Consolidated Action, the certification of the Class, the proposed Partial Settlement and *this Notice may affect your claim or your action.* . . .

THE RELEASE TO BE GIVEN TO THE PSI SETTLING DEFENDANTS AND THE RELEASED PARTIES IS VERY BROAD AND MAY IMPACT UPON OTHER RIGHTS OR CAUSES OF ACTION YOU HAVE." (A390) (emphasis added)

As ordered by Judge Pollack, the Class Notice was 1) mailed to all Class Members who could be identified with "reasonable effort" by Lead Class Counsel with the cooperation of PSI, which made relevant information available to Lead Class Counsel; and 2) published by Lead Class Counsel in the national editions of *The Wall Street Journal*, *The New York Times* and *U.S.A. Today* twice within ten days of the Class Notice mailing. Both the Class Notice and Published Notice informed Class Members, *inter alia*, of the necessity to opt out by October 30, 1995 if a Class Member desired to proceed individually with his or her claims.[8]

Prior to its mailing and publication and after first incorporating his own revisions therein, Judge Pollack determined that the form and method of notifying the Class Members of the terms and conditions of the Settlement met "the requirements of F.R. Civ. P. 23 and due process, constitute[d] the best notice practicable under the circumstances, and ... constitute[d] due and sufficient notice to all persons and entities entitled thereto." (A192)

In accordance with the Preliminary Order, PSI provided the Claims Administrator with certain addresses to which Class Notices were to be directed. (A191) Those addresses appeared in a data base maintained by PSI of all purchasers of Partnerships sold through its Direct Investment Group. This data base, which contained information on several hundred thousand PSI accounts and which had been utilized by PSI without objection in connection with the SEC Fund (*see supra* n.4), was considered to be the best practicable source for

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[8] Petitioners did not opt out by October 30, 1995.

identifying Class Members. It was not, however, totally error free—nor could it be expected to be.

As ordered by Judge Pollack, on September 18 and 19, 1995, Lead Class Counsel sent copies of the Class Notice by mail to approximately 100,000 investors.[9] (A382) In addition, the Published Notice appeared in the national editions of *The Wall Street Journal, The New York Times* and *U.S.A. Today*, on two separate occasions in each paper, and copies of the Class Notice were also mailed to persons responding to the Published Notice.[10] (A409; A594)

C. Proceedings Below

(i) The November 17, 1995 Fairness Hearing

On November 17, 1995, Judge Pollack conducted a Fairness Hearing to determine the fairness, reasonableness and adequacy of the Settlement. Petitioners did not appear at the Fairness Hearing or otherwise file a timely objection to the Settlement. (A621; A451-55)

At the Fairness Hearing, PSI explained that, even though the opt-outs exceeded the $10 million threshold, it had elected not to "blow" the Settlement, *i.e.*, having analyzed the quantity and quality of the opt-outs, PSI decided not to exercise its termination rights. (A482) PSI explained that it would be looking to the District Court to enforce those provisions of

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[9] Of approximately 350,000 potential Class Members (*i.e.*, Partnership investors) (A297), there are (after application of all relevant exclusions) approximately 100,000 Class Members. (A594) Approximately 250,000 Notices were sent because some Class Members had multiple accounts and PSI was unable to identify and remove some excluded investors from the mailing list. (*Id.*)

[10] The court-ordered mailings and publication were not the sole notice to investors—the Settlement received widespread national media coverage through press and wire service reports and a CNN television news segment. (A1046) Beyond this, entrepreneurial lawyers with access to investor lists also solicited investors to opt out. (*E.g.*, A377)

the Settlement which afforded it the finality and repose that it had bargained and paid for. (A483)

At the close of the Fairness Hearing, Judge Pollack held:

> "On the basis of a thorough understanding of this matter, and there being no pertinent objection voiced either in writing or before the Court, the Court finds that the partial settlement proposed in every aspect meets all legal requirements and is intrinsically and objectively fair, reasonable and adequate and in the best interests of the class and is in all respects approved." (A516)

(ii) The November 20, 1995 Order And Final Judgment

On November 20, 1995, the District Court entered the Final Judgment (i) finally certifying the Class against the PSI Settling Defendants; (ii) approving the Settlement; (iii) dismissing all Settled Claims by Class Members against the Released Parties on the merits and with prejudice; and (iv) enjoining Class Members (including Petitioners) from instituting, commencing or prosecuting any action or proceeding asserting any of the Settled Claims against any of the Released Parties.[11] (A640-46) Judge Pollack retained exclusive jurisdiction over all matters relating to the litigation including the "administration, interpretation, effectuation or enforcement of" the Settlement Agreement as incorporated by the Final Judgment. (A648)

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[11] On November 20, 1995 Judge Pollack also entered extensive Findings of Fact and Conclusions of Law (A592) wherein he determined that certification of the Class was appropriate because the Class satisfied each element of Federal Rule of Civil Procedure 23(a), including the requirements of adequate representation and typicality, as well as those of Federal Rule of Civil Procedure 23(b)(3).

(iii) Petitioners' Post-Judgment Motion

Subsequent to entry of the Final Judgment, Judge Pollack addressed the motions of various Class Members, including the Tolands, pursuant to Rules 6(b) and 60(b) for extraordinary relief from the Final Judgment and permission to opt out belatedly. The Tolands, who were purchasers of Energy Income Limited Partnerships, petitioned the District Court for an order declaring that the Order and Final Judgment is not binding as to them—notwithstanding that they had failed to opt out by the October 30 deadline and thus are members of the Class bound by the Order and Final Judgment including the injunction contained therein against prosecuting any Settled Claims against PSI in any forum.

Because the Class defined by the Order and Final Judgment excludes investors whose claims were previously settled or finally adjudicated, individually or on a class-wide basis, the Tolands would be members of the Class only if they had validly opted out of the settlement class previously certified by Judge Livaudais of the Eastern District of Louisiana in *In re Prudential-Bache Energy Income Partnerships Securities Litigation*, MDL 888 (the "EI Class Action"). If the Tolands did *not* validly opt out of the EI Class Action, then they would be members of *that* class (and thus bound by the injunction in *that* action). Through the course of this litigation, the Tolands have persistently attempted to camouflage the underlying facts by offering contradictory statements regarding whether or not they validly opted out of the EI Class Action.[12]

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[12] The Tolands persist in their double-talk on this issue in their Petition to this Court. For example, the Tolands characterize themselves in the initial question presented as having "already opted out" (Pet. at i) of the prior class action. However, at page 6 of their Petition, the Tolands claim that they never "submitted a new opt out form" and "did not opt out of the second Louisiana MDL settlement." Yet, two pages later they state again that they "had already opted out of the Louisiana MDL to pursue individual arbitration" (Pet. at 8).

(footnote continued on following page)

Assuming, *arguendo*, that the Tolands validly opted out of the EI Class Action and are thus members of this Class, they argued that their failure personally to receive the mailed Class Notice renders the Final Judgment void as to them.[13] PSI conceded that the Tolands were not on the mailing list utilized by the Claims Administrator (A1225) because the data base used to prepare that list showed them to be members of the EI Class (A1227-28), a fact confirmed by the EI Class Claims Administrator (*id.*).[14] In fact, they were mailed a check in set-

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Although there is serious doubt that the Tolands did, in fact, validly opt out of the EI Class Action, PSI argued below that the answer to that question is in any event irrelevant to the issue of whether the Tolands can continue to prosecute their arbitration against PSI. If the Tolands did in fact validly opt out of the EI Class Action, they are then members of the Class certified by Judge Pollack and thus bound by the Order and Final Judgment, including the provision barring the continued prosecution of Settled Claims. If, however, they did not validly opt out of the EI Class Action, they are then members of the class certified by Judge Livaudais and thus barred by *that* settlement from pursuing further arbitration proceedings. In *either* scenario, PSI argued that the Tolands are enjoined from the continued prosecution of their arbitration against PSI. There is no third alternative.

13 The Tolands' dilemma is this: they *must* argue that they validly opted out of the EI Class, or else they have no excuse to be in arbitration at all. However, once they make that argument, they find themselves squarely in the Class below. Not liking that result (and apparently wholly unconstrained by any concept of truth), they then switch to the argument that they did *not* opt out of the EI Class. While they may believe that this helps them with their instant dilemma, they overlook the fact that it of course leaves them enjoined by Judge Livaudais from continuing their apparently much-desired arbitration. Checkmate!

14 Upon being informed during the proceedings below that the Tolands did not receive a direct mailing of the Class Notice, PSI commenced an investigation as to why this occurred. The November 3, 1995 Affidavit of G. Peter Buchband [of the Garden City Group, the Class Counsel-selected, court-approved Claims Administrator] Concerning Mailing and Publication of Notice to the Class (Pet. App. at 28) details the court-ordered mailing process and the cooperation provided by PSI. Paragraph 3 thereof notes, correctly, that PSI excluded from the data provided to the Garden City Group all investors who were ineligible to par-

tlement of their claims in the EI Class Action; a check that the Tolands assert they returned uncashed. (Pet. at 6)

While the Tolands did not receive direct mail notice of this Class Action, Mahlon Frankhauser, PSI's counsel in connection with the Tolands' arbitration, personally raised the issue of the Class Settlement with the Tolands' counsel on October 17, 1995—almost two weeks prior to the October 30, 1995 deadline for filing an exclusion and four weeks prior to the Fairness Hearing. (Pet. App. at 60) Mr. Frankhauser testified by affidavit that he discussed with the Tolands' counsel whether the Tolands had received the Class Notice; that he cautioned counsel that the opt-out date was October 30, 1995; and that he recommended the Tolands' counsel call a PSI in-house lawyer (whose name and telephone number he provided) for further details regarding the Class Action. (*Id.*) *The Tolands' counsel admitted that this conversation occurred* but disputed the precise details. (A1494) Although the Tolands' counsel was thus admittedly on sufficient notice that he should make further inquiry and take steps to exclude his clients from the Class if they wished to continue to pursue their claims independently, *he took no such steps*. The dialogue between Judge Pollack and the Tolands' counsel illustrates counsel's jaundiced view of his duty to inquire about

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ticipate by reason of membership in classes with which PSI had previously settled. PSI's investigation showed that the Tolands were excluded from the mailing list because the data base used to prepare that list showed them to be members of the EI Class — a fact subsequently confirmed by the EI Claims Administrator. (A1227-28) The Tolands (who sometimes claim to have opted out of the EI Class (*e.g.*, Pet. at 8) and sometimes claim not to have opted out of the EI Class (*e.g.*, Pet. at 6)) never disclosed their "I opted out/I didn't opt out" of the EI Class shenanigans to PSI, to the arbitrators or to Judge Pollack. Nor had they sought an order from Judge Livaudais "correcting the records" in the EI Class Action, which show that they are members of that class barred by that settlement from pursuing further arbitration proceedings against PSI. They simply proceeded with their arbitration, saying whatever they needed to say whenever it suited their purposes *du jour*.

the Settlement on behalf of his clients after being put on actual notice:

> "THE COURT: What effort did you make to get the notice or to find out whether you were making a big mistake on your client's behalf?
>
> Did you make any effort to get a copy of the notice so that you can satisfy your client's interests that you were not making a—something I keep on telling my law clerks—don't speculate, don't presume, don't do any of the other things other than look and listen.
>
> Now, you did nothing about looking and listening, did you? Did you just say, 'Okay, I might as well forget it'?
>
> MR. DUNCAN: No, your Honor.
>
> THE COURT: Tell me about it.
>
> MR. DUNCAN: I was not put on notice that we needed to check it out. *You put no affirmative duty or I had no affirmative duty to do that.*
>
> * * *
>
> THE COURT: Let me ask you this question:
>
> You're familiar with the line of cases and the rule of law that the only obligation of clients' counsel and clients' interest is to give a reasonable notice in the most practical way, and you're familiar also with the fact that a number of cases have decided that if that notice falls by the wayside in a few cases here, there and everywhere, that i[t] does not affect the requirements under Rule 23.
>
> Now, with that knowledge, legal knowledge, on your part, what position do you really have here because you didn't apprehend exactly what Frankhauser was telling and you did nothing to follow it up, just tell me where you come in that circle of events.

> MR. DUNCAN: I'd be glad to, your Honor. I was relying on Rule 23. *I was relying on the fact that if my client was really involved, that he would get a notice . . . .*" (A1495-97)[15]

Unpersuaded by this ostrich-like behavior of their chosen counsel, Judge Pollack denied the Tolands' motion for relief from the Final Judgment by Order dated January 23, 1996. (Pet. App. at 43)

(iv) The District Court's Opinion

Judge Pollack issued a sixteen-page Opinion dated February 1, 1996, supplementing his orders on the various belated opt-out motions including the Tolands'. (164 F.R.D. 362)[16] At the outset, he addressed the due process requirements for notice of class action settlements. Relying on this Court's opinion in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), he held that due process is afforded through "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (A1640) Citing well-established authority from various circuits, Judge Pollack further held that "for the due process standard to be met, it is not necessary that every class member receive actual notice, so long as class counsel acted

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[15] The Tolands' counsel continues this sophistry in the Petition when he boldly asserts that Mr. Frankhauser's mentioning of "one more state [sic] class action was not the equivalent of mentioning another MDL. . . ." (Pet. at 14), apparently confusing a kind of action with a means for centralizing several different actions. Of course, the focus below was not on what Frankhauser *said* but on what the Tolands' counsel *did* or *failed to do* in response. *See infra* p. 20 n.19, p. 24.

[16] The Tolands, who improperly include in their Appendix materials *dehors* the Record (*e.g.*, Pet. App. at 63), did not bother to append Judge Pollack's February 1, 1996 opinion—as mandated by Supreme Court Rule 14.1(i)(i).

reasonably in selecting means likely to inform persons affected." (A1641)

Judge Pollack confirmed his earlier finding that the form of the Notice and the procedures for its dissemination comported with due process. (A1641) The mailing of class notice to each identifiable class member whose address could reasonably be located, combined with published notice in national newspapers, as occurred here, is a virtually universal procedure that "has been given wide-spread approval in other class actions." (*Id.*)

Judge Pollack recognized that notwithstanding the propriety of these commonplace notice procedures, a court retains discretionary power to allow claimants to file late opt-out requests pursuant to Rules 6(b), 60(b) and 23(d) (A1642), but only upon a showing of "excusable neglect," and then only after considering "the interests of the movants, the interest of the defendants, and the impact of granting the requested extensions on the Settlement itself." (A1643)

Judge Pollack held that Class Members who, like the Tolands, did not receive the mailed Class Notice are nevertheless bound by the Final Judgment because actual receipt of mailed notice by each class member is not a requirement of due process. (A1643) Furthermore, he rejected the argument that the Tolands' prior commencement of an arbitration against PSI indicated their preference to pursue claims against PSI individually and thus justified their failure to opt out and entitled them to some form of supplemental notice. Rather, he held that the mere "pendency of an individual action neither excuses failure to file an exclusion from a class action nor entitles the Class Member to notice above and beyond that due other Class Members." (A1646) Finally, Judge Pollack held that by electing not to "blow" the Settlement, PSI had bargained for the very finality the Tolands were seeking to undermine and thus would be severely prejudiced if they were granted the relief they sought. (A1646-47) In this regard,

Judge Pollack noted that granting leave to file untimely exclusions "would undermine the finality of judgments" and "would discourage settlement of such actions." (A1649)

(v) The Decision of the Court of Appeals

The Tolands thereafter appealed to the Court of Appeals.[17] On December 27, 1996, the Court of Appeals unanimously and summarily affirmed the denial of the Tolands' motion. In an unpublished opinion (Pet. App. at 1), the Court of Appeals held that in addressing the belated opt-out motions of the Tolands and others, the District Court properly considered the prejudice to PSI caused by additional late opt-out requests as "such late claims increase the liability exposure [to PSI] that the settlement was intended to limit." (Pet. App. at 7)

The Court of Appeals further held that the Tolands' omission from the mailing list was not dispositive because they were afforded publication notice and received personal notice prior to the expiration of the opt-out deadline. (Pet. App. at 14) Finally, the Court of Appeals held that PSI's previous agreement to arbitrate with the Tolands did not insulate them from the requirement of opting out—as the District Court had held. (*Id.*) The Tolands did not petition for rehearing or for *en banc* consideration.

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[17] Judge Pollack ruled against most of the Class Members seeking permission belatedly to opt out of the Class (although he granted relief to four Class Members on PSI's consent (A1 - R.339; A1 - R.388)). Six appeals from these orders (including the Tolands') were taken and consolidated in the Court of Appeals. Neither the Tolands nor any other Class Members timely appealed from the November 20, 1995 Final Judgment certifying the Class and approving the Settlement. Consequently, the factual findings and legal conclusions embodied in the Final Judgment were not properly before the Second Circuit, which dismissed as untimely the one appeal (not by the Tolands) purporting to be from the Final Judgment. (Pet. App. at 54)

SUMMARY OF ARGUMENT

This case is a paradigm of the type of fact-specific appeal that is unworthy of the exercise of this Court's certiorari jurisdiction. The Petition does not identify, nor does there exist, any ground upon which a writ of certiorari should be granted. None of the questions purportedly raised by this Petition presents either a conflict among the circuits, a conflict between the ruling of the Court of Appeals and any ruling of this Court, or any otherwise important and unresolved federal question of general or widespread applicability. To the contrary, Petitioners simply aver that well-settled and routinely followed law regarding class action settlement notification was misapplied to the unique (and somewhat bizarre) facts of their particular case by Judge Pollack whose putative error was not corrected by the Court of Appeals. They invite this Court to conduct yet a third review of the extensive factual record for error; to second-guess the conclusions reached by both courts below, *viz.*, that they have not established their entitlement to relief under Rules 6(b) or 60(b) which is discretionary in any event. The further factual review that Petitioners seek is plainly not deserving of a writ of certiorari. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.") Our federal court system provides for one level of judicial determination (the District Court) and one level of review for error, *vel non* (the Court of Appeals). Beyond that, there is no further review for mere error (as opposed to certiorari), and that is all that Petitioners seek.

Nor are the fact-specific issues which the Petition identifies for review meritorious on the record presented. The Tolands admit (Pet. at 9) that they never raised the issue of inadequate representation in the Court of Appeals and thus that Court never addressed it below. They also fail to identify any support whatsoever for their suggestion that their interests were inadequately represented. Moreover, on the notice issue,

despite their failure to receive the mailed notice, they are forced to concede (Pet. at 13-14) that their counsel was put on actual notice of the existence of the class action Settlement in this case nearly two weeks before the opt-out deadline, and four weeks before the Fairness Hearing, but inexplicably took no steps to opt his clients out or make any further inquiry. On this uncontroverted factual record, no extensive citations are required for the proposition that the courts below were correct in finding that the Tolands' due process rights were not violated. Even if, *arguendo*, the process did not work for the Tolands, there was nothing wrong with the process itself. There is simply no basis upon which a writ of certiorari should issue.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS' DECISION RAISES NO ISSUE WORTHY OF THIS COURT'S CONSIDERATION AND WAS CORRECT IN ANY EVENT

The unworthiness of this case for review by this Court is demonstrated, at the outset, by a series of concessions that the Tolands are obliged to make in their Petition. Despite the fact, for example, that the very first question purportedly raised by the Petition is whether the Tolands' due process rights were violated by their allegedly inadequate representation by the Class Representatives (which resulted in their inclusion in the Class definition), the Tolands are constrained to concede that they failed to raise that issue in the Court of Appeals (Pet. at 9) and have therefore waived it. *See EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) (per curiam) (this Court "refrain[s] from addressing issues not raised in the Court of Appeals").

The Tolands' second question presented relates to whether their due process rights were "further" violated by their fail-

ure to receive "written" notice of the proposed class action Settlement. The Tolands are again forced, however, to acknowledge (as they did in the courts below) that thirteen days prior to the expiration of the opt-out deadline, they (through their counsel) were put on actual notice of the existence of the class action proceedings but took no steps to opt themselves out of the Class or make any further inquiry. (Pet. at 7, 14) Given these two concessions, it is clear that no issue of due process arises, no important unresolved federal issue is presented and no intercircuit controversy is even attempted to be claimed. The Tolands simply screwed up.

Even if the Tolands had not waived the question of whether their interests were adequately represented by failing to raise it in the Court of Appeals, they offer no authority (much less conflicting authority) to support their legally unsupported—and factually incorrect (*see infra* note 20)—(and truistic, but irrelevant) assertion that "[c]ertifying a class action to afford opted-out account holders *less* than they could have received through previous class litigation does not serve their interests." (Pet. at 9)

First, as discussed *supra*, there is substantial doubt that the Tolands ever validly opted out of the EI Class Action; indeed, even in their Petition to this Court they continue the same duplicity on this issue which they previously exhibited to the arbitrators, PSI and both courts below. (*E.g.*, Pet. at i, 6 and 8) Second, even assuming *arguendo* that they validly opted out of the EI Class Action, their inclusion in the Class is hardly evidence of inadequate representation because like all Class Members, the Tolands were afforded the *opportunity* to opt out of the Class.[18] Their failure to avail themselves of

[18] In affording Class Members, including the Tolands, the opportunity to opt out of the Class as required for class actions certified under Rule 23(b)(3), this case does not present the issue raised in *Ticor Title Insurance Co. v. Brown*, 511 U.S. 117 (1994), and *Adams v. Robertson*, 117 S. Ct. 1028 (1997). In those recent cases, this Court granted (but ultimately dismissed) writs of certiorari to review the question of whether due process requires that proposed class members have an opportunity to

this mechanism simply does not rise to a deprivation of due process and thus is not worthy of this Court's review.[19]

Third, the Tolands base their claim of inadequate representation on an alleged antagonism of interests between themselves on the one hand and the rest of the Class on the other. (Pet. at 8) This perceived antagonism, however, is rooted solely in the Tolands' dissatisfaction with a mistaken view of the amount of their potential recovery under the Settlement when compared with the amount they claim they would have

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opt out of the certification and settlement of a nationwide state court class action. Unlike the class members in those cases, however, the Tolands and all Class Members herein were afforded the opportunity to opt out if they wished to pursue their claims against PSI individually; indeed, approximately 5800 Class Members availed themselves of this option. Accordingly, in light of the systemic denial of any opt-out opportunity in both *Ticor Title* and *Adams*, those petitions presented far stronger issues for review than does the instant one. Nevertheless, this Court dismissed its writ of certiorari as improvidently granted in each case and, in *Ticor Title*, noted that where the constitutional question presented is of great practical importance only to the litigants (and hypothetical as to everyone else), it "is ordinarily not sufficient reason for . . . granting certiorari. . . ." 511 U.S. at 122. Viewed another way, the class members in *Ticor* and *Adams* complained that they were *denied* precisely what the Tolands were *afforded*, *viz.*, an opportunity to opt out. Those class members argued that the denial of an opportunity to opt out constituted a denial of due process—*i.e.*, they wanted what the Tolands got. Even if it was appropriate to have granted certiorari in those cases, it would be wholly inappropriate to grant the Petition of the Tolands who received what petitioners in *Ticor* and *Adams* recognized as the paradigm of due process.

[19] Indeed, on this factual record, the only questionable representation received by the Tolands was that of their arbitration (and Supreme Court) counsel who admits that he was informed of the Settlement thirteen days prior to the opt-out deadline, but took no action to clarify whether his clients were Class Members or otherwise inform himself in the premises. (A1495-96) *See Langford v. Devitt*, 127 F.R.D. 41, 44-45 (S.D.N.Y. 1989) ("[U]nlike a layman, [petitioner's counsel] was then in a position to understand the significance and potential effects of the class action. . . . He was also in a position to understand the significance of not having received formal notice and how to correct that problem.")

recovered in the EI Class Action.[20] (Pet. at 8) Pretermitting the faultiness of this comparison, and that the Tolands waived any objection to the fairness of the Settlement by failing to object at the Fairness Hearing or take a timely appeal from the Final Judgment, we are aware of no case that has held that dissatisfaction with the amount of recovery under a class action settlement is sufficient to demonstrate inadequacy of representation *per se*. In any event, the individual and fact-specific nature of this issue is not worthy of this Court's time.[21]

Nor does the second question purportedly presented by the Petition raise any issue worthy of this Court's consideration. The Tolands do not question the procedural adequacy of the everyday, garden-variety, prototypical notice program employed here by Judge Pollack; nor could they. Individual

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[20] The Tolands' assertion in this regard not only highlights the fact-specific nature of their Petition but also points out the evil of citing matters *dehors* the Record. At page 63 of their Appendix, Petitioners attach a letter (written after issuance of the Second Circuit's mandate and not seen by PSI prior to its receipt of the Petition) which recites an estimate that the Tolands would receive approximately 35% of their Weighted Recognized Loss. This may well be a typographical error as Judge Pollack has since signed an order directing the Claims Administrator to mail checks to claimants for approximately 51% of their Weighted Recognized Loss. The Tolands' share would thus be in excess of $60,000 or almost 20% *more than* their participation in the EI Class settlement. The Tolands would also be eligible to participate in additional settlements with other defendants in MDL 1005.

[21] To the extent that the Tolands' reference (*dehors* the Record) to 16,000 similarly situated investors who opted out of the EI Class Action (Pet. at 8, 12) is meant to suggest that this Petition is of significance to any Class Members other than themselves, they are misleading this Court. The Tolands are the *only* Class Members who petitioned Judge Pollack for extraordinary relief from the Settlement on the ground that they had opted out of the EI Class Action and therefore should not be members of this Class. The remaining 16,000 opted-out EI Class members presumably fell within an exclusion from the Class definition, opted out of the Class or were otherwise satisfied with their Settlement recovery.

first-class mailings to reasonably identifiable Class Members as supplemented by an extensive published notice program plainly constitutes "the best notice practicable under the circumstances" as required by Rule 23, due process and the teachings of this Court. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983).

Instead, the Tolands maintain that the Final Judgment was void as to them because they did not *receive* the mailed Notice. In support of this proposition, the Tolands make the incredible assertion that the rulings below are inconsistent with the rulings of this Court in *Mullane* and *Eisen*. The Tolands' argument fundamentally misinterprets the holdings in those cases.

Neither *Mullane* nor *Eisen* established a due process right to *receive* class action notice. Rather, in both cases, this Court stated that in order for the due process standard to be met, the notice procedures must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." *Mullane*, 339 U.S. at 314; *Eisen*, 417 U.S. at 174. Further, in endorsing first class mail as the means of accomplishing that notice, this Court recognized that "reasonable risks that notice might not actually reach every beneficiary are justifiable." *Mullane*, 339 U.S. at 319.

The unanimity of the Courts of Appeals in interpreting *Mullane* and *Eisen* on this issue is clear. *See, e.g., Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (noting that neither *Mullane* nor *Eisen* requires actual receipt of notice); *Peters v. National Railroad Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992) (relying on *Mullane* and holding that "the due process clause does not amount to a guarantee of notice to a class member"); *Weigner v. City of New York*, 852 F.2d 646, 649-52 (2d Cir. 1988) (holding that compliance with the *Mullane* standard "does not mean that all risk of non-

receipt must be eliminated"), *cert. denied*, 488 U.S. 1005 (1989); *Zimmer Paper Products Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 91-93 (3d Cir.), *cert. denied*, 474 U.S. 902 (1985) (finding no obligation to verify receipt of notice by mail to satisfy due process); *In re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979) (upholding validity of notice procedure even though mailing list did not contain every member of class), *cert. denied*, 452 U.S. 905 (1981).[22]

The Tolands' reliance on *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977), is wholly misplaced. Unlike the proposed list in *Nissan*, which omitted "substantial numbers of the certified class," *id.* at 1095, PSI's data base contained the names and addresses of virtually all eligible Class Members. The fact that the data base was not one hundred percent error-free does not render the notice procedure invalid. *See Gross* v. *Barnett Banks, Inc.*, 934 F. Supp. at 1345 (holding that verification of addresses on mailing list not required to satisfy Rule 23 or due process). Moreover, supplemental notice was provided to absent class members through publication in national newspapers.[23]

The Tolands also urge that they are somehow entitled to special notice because of their status as claimants in a pending arbitration. (Pet. at 12) Once again, however, the Tolands offer no legal authority for their argument nor evidence of a

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[22] *See also Gross v. Barnett Banks, Inc.*, 934 F. Supp. 1340, 1345 (M.D. Fla. 1995); *Lake v. First Nationwide Bank*, 156 F.R.D 615, 628 (E.D. Pa. 1994); *Hallman v. Pennsylvania Life Insurance Co.*, 536 F. Supp. 745, 748 (N.D. Ala. 1982); *Valente v. Pepsico, Inc.*, 89 F.R.D. 352, 363 (D. Del. 1981); *In re U.S. Financial Securities Litigation*, 69 F.R.D. 24, 46-47 (S.D. Cal. 1975).

[23] The sufficiency of the notice program is underscored by the overwhelming response of this 100,000-plus member Class. Over 274,000 Notices were mailed to prospective Class Members. (Pet. App. at 4) An additional 10,926 parties responded to the Published Notice and received the full Notice by mail. (Pet. App. at 5) Approximately 5800 Class Members filed timely opt outs and over 100,000 Class Members filed Proofs of Claim to participate in the Settlement.

significant (or any) conflict among the circuits or between the Court of Appeals and this Court. Nor could they, as this proposition has been soundly rejected. *See Penson v. Terminal Transport Co.*, 634 F.2d 989, 996 (5th Cir. 1981) ("A judgment or a consent decree entered in a class action can bind the absent class member even though the member had filed a claim or instituted a personal suit before the decision in a class action."); *Supermarkets General Corp. v. Grinnell Corp.*, 59 F.R.D. 512, 514 (S.D.N.Y. 1973) (noting that class members were entitled "only to such notice as the [other] members of the class were entitled to and [they] did not gain additional rights because they had instituted an independent action"), *aff'd per curiam*, 490 F.2d 1183 (2d Cir. 1974).

In any event, the Tolands' contention that their due process rights were violated is undermined by their concession of the existence of the conversation between their counsel and PSI's counsel thirteen days prior to the opt-out deadline. Thus, even if this issue were otherwise of significance or the basis of any conflict among the circuits, it is hardly best presented to this Court in the context of a case in which the decisions of the courts below were based on facts unique to this case, including the failure of the very counsel who would argue this case in this Court to satisfy his professional obligations to his clients in the first place—which is, after all, the reason for their predicament. *See Langford v. Devitt, supra*, 127 F.R.D. at 45 (holding that class members "cannot rely on [their counsel's] own inaction to justify late exclusion").

In short, the notion that the due process standard was not met by the routine, ordinary and non-controversial notice program adopted by Judge Pollack (now in his 30th highly acclaimed year on the federal bench[24]) and unanimously

[24] Judge Pollack's remarkable judicial service is well-known to this Court. *See* 909 F. Supp. LXV (1995), reporting the presentation to him of the Edward J. Devitt Distinguished Service to Justice Award and noting Judge Pollack's "talent for rapid resolution of large and complex cases, [his] ability to unclutter, to clear fog, to thrive under pressure, [and] to persevere until the hardest case is done." *Id.* at LXXV.

approved by the Court of Appeals is not only contrary to *Mullane* and *Eisen*, but to the Record in this case. The Tolands have not presented any ground upon which this Court should issue a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
April 25, 1997

Respectfully submitted,

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